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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 284

WARREN PINTO, Superintendent, New Jersey State Prison Farm, Rahway, New Jersey,

Petitioner,

vs.

UNITED STATES OF AMERICA, *ex rel.* LAWRENCE PIERCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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vs.

UNITED STATES OF AMERICA *ex rel.* LAWRENCE PIERCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on March 28, 1967.

Opinions Below

The opinion of the United States District Court for the District of New Jersey, *infra*, pp. 1a-8a, is reported as *United States ex rel. Pierce* v. *Pinto*, 259 F. Supp. 729 (D. N. J. 1966). The *per curiam* affirmance of the United States Court of Appeals for the Third Circuit, *infra*, p. 10a, is reported in 374 F. 2d 472 (3 Cir. 1967).

Jurisdiction

The United States Court of Appeals for the Third Circuit entered judgment in this case on March 28, 1967.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

Questions Presented

1. Does this Court's decision in *Jackson* v. *Denno* require as a matter of constitutional dimension that the independent hearing into the voluntariness of a confession be conducted outside the presence of the jury?

2. Has the United States Court of Appeals for the Third Circuit erroneously interpreted the rule of *Jackson* v. *Denno* in a manner which directly conflicts with long-established law of the State of New Jersey?

3. If *Jackson* v. *Denno* is to be interpreted as requiring that the hearing into the voluntariness of a confession be outside the presence of a jury, should that interpretation be made retroactive?

4. If the procedure in the present case under which the voluntariness of the confession was heard did violate the rule of *Jackson* v. *Denno*, is it not true that a new hearing on voluntariness and not an entirely new trial would be the appropriate remedy?

Constitutional Provision Involved

The relevant constitutional provision involved in the instant case is Section 1 of the Fourteenth Amendment of the United States Constitution which provides:

"AMENDMENT XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

The present case has precipitated a very substantial divergence of opinion between the United States Court of Appeals for the Third Circuit and the Supreme Court of New Jersey. In *State v. Broxton*, —— N. J. —— (decided May 29, 1967—appended hereto), the New Jersey Supreme Court indicated that it would not follow the ruling of the Third Circuit in the case *sub judice*. The decision in *Broxton* has attracted nationwide attention. See 35 *U. S. L. Week* 1185 (June 6, 1967); New York Times (May 30, 1967, p. 9); Newark Evening News (May 29, 1967, p. 1).

Lawrence Pierce (hereinafter referred to as defendant) was indicted by the Grand Jury of Essex County, New Jersey on July 2, 1959, for the crime of robbery (N.J.S. 2A:141-1) while armed (N.J.S. 2A:151-5). Following entry of a plea of not guilty on July 13, 1959, he was tried and convicted before the Honorable James R. Guiliano and a jury in the Essex County Court. He was sentenced on December 15, 1959, to a term of 16 to 23 years in New Jersey State Prison. No appeal was taken from that conviction.

On October 29, 1965, defendant filed a petition for post-conviction relief in the Superior Court of New Jersey. In that petition he alleged, essentially, (1) that he had been coerced into making oral and written statements during the time of his detention by the police department and (2) that the trial court had erred in its charge to the jury. The post-conviction application was considered by the Honorable James R. Guiliano who, on April 22, 1966, signed an order denying relief. Defendant did not appeal from that denial.

On June 6, 1966, defendant filed a petition for a writ of habeas corpus in the United States District Court. In an opinion and order filed September 29, 1966, the Honorable Renyier J. Wortendyke, Jr. granted the writ but stayed its effectiveness "pending a decision of the respondent (here petitioner) to either appeal the order of this Court or grant petitioner (here respondent) an evidentiary hearing on the voluntariness of his confession." On October 3, 1966, petitioner filed a motion for a reargument, which motion was subsequently granted. Following reargument Judge Wortendyke rendered a supplemental opinion and order on October 28, 1966. This latter order granted defendant's application for a new trial. Both orders are reported as *United States ex rel. Pierce* v. *Pinto*, 259 F. Supp. 729 (D. N. J. 1966) (1a-8a). Following appeal by the petitioner, the United States Court of Appeals for the Third Circuit rendered a *per curiam* opinion of affirmance (374 F. 2d 472 (3 Cir. 1967).) The opinion and judgment of the Court of Appeals were filed on March 28, 1967 (10a, 11a).

During defendant's trial in November of 1959, the State of New Jersey had marked for identification a statement previously given by him. The State offered testimony with respect to the voluntariness of that statement after the

court first asked defense attorney whether there was any objection to the testimony being taken in the presence of the jury. The response to that was, "none whatsoever." The court continued by saying to the defense attorney, "as you know, it can be taken in their presence or out of their presence, and that is a matter of discretion with the Court though I am inquiring of you if you have any objections. If you did I would hear you but I assume you have none." Again counsel replied, "I have none." The testimony with regard to voluntariness was then taken after which the court permitted the statement to be marked in evidence. The jury was told the following:

> "Members of the jury, as I indicated to you previously, where the State offers in evidence a statement the question of voluntariness is for the court to pass upon. The defendant in this case through his attorney contended that the statement was not voluntarily given and offered testimony. He testified, as you will recall, that the reason he gave the statement was that he was beaten by Detective Nisivoccia and that Detective Byrne grabbed him at his privates and because of that he agreed to give a written statement and when he was giving the written statement he testified he didn't know the answers to the questions but, nevertheless, the police put in that statement the facts which you will find contained therein. Now, in a situation of that type, the Court must pass upon the question of voluntariness. I have ruled that the statement was voluntarily given and I have admitted the statement into evidence over the objection of counsel for the defendant.
>
> "Now, what weight and credibility you will give to this statement will be for you to decide. It will be for you to also consider the question of voluntari-

ness together with what weight or credibility you shall give that statement. At the end of the case I will charge you more fully as to the effect of this statement and the law pertaining to this statement."

Reasons Why a Writ of Certiorari Should be Granted

POINT I

The United States Court of Appeals for the Third Circuit has misconceived the holding of this Court in *Jackson* v. *Denno* as constitutionally requiring that the independent hearing into the voluntariness of a confession be conducted outside the presence of the jury.

Prior to the decision of this Court in *Jackson* v. *Denno*, 378 U. S. 368 (1964), there were several approaches invoked in the various jurisdictions of the United States for determining the voluntariness of a confession. In those states which followed the so-called orthodox view, the issue of voluntariness was wholly for the judge, the jury's function being limited to determining the credibility of the confession. Dean Wigmore supported this view on the theory that voluntariness had to do with admissibility and that the latter was no concern of the jury. 3 Wigmore, *Evidence* (3rd ed. 1940), § 861.

The second approach, called the "New York" rule, left the issue of voluntariness to the jury with instructions to disregard the confession if not found to be voluntary. Under that view the trial judge did not himself decide a disputed issue of fact. It was this approach that was condemned in *Jackson* v. *Denno*, *supra*. The third approach, which received extensive support prior to the *Jackson* case, was called the Massachusetts or "humane" rule.

This required both the judge and jury to pass upon voluntariness, both obligated to reject the confession if found to be voluntary.

While the New York rule was invalidated in *Jackson*, the other two procedural approaches (the orthodox and the Massachusetts rules) seem to have been given this Court's approval. The majority described the New York rule and then, by way of contrast, said:

> "In jurisdictions following the orthodox rule, under which the judge himself solely and finally determines the voluntariness of the confession, or those following the Massachusetts procedure, under which the jury passes on voluntariness only after the judge has fully and independently resolved the issue against the accused, the judge's conclusions are clearly evident from the record since he either admits the confession into evidence if it is voluntary or rejects it if involuntary. Moreover, his findings upon disputed issues of fact are expressly stated or may be ascertainable from the record." (*Id.* at pp. 378-79)

In an affirmative sense, this Court ruled that it was both practical and desirable that in "cases to be tried hereafter a proper determination of voluntariness be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence" (*Id.* at p. 395).

Jackson v. *Denno* did not involve the question whether the trial judge may hear the issue of voluntariness in the presence of the jury. In fact, that case involved a situation in which the judge did not try the issue at all, for under the doctrine there applied, the jury alone passed upon voluntariness. It was precisely because the trial

judge did not decide the question that the majority in *Jackson* found the "New York" rule to be invalid. Specifically, the majority believed it to be wrong to leave voluntariness to the jury alone because there was no way to know whether all the jurors found the confession to be voluntary and because there was the danger that a lay person would use the confession even if it were deemed involuntary.

The court below, in embracing the decision of the United States District Court, has held that the Constitution forbids a trial court from hearing the issue of voluntariness in the presence of the jury. The cases which were relied upon by the District Court and by the United States Court of Appeals do not appear to support that proposition of law.

In *United States* v. *Carignan*, 342 U. S. 36 (1951), the alleged error was in the refusal to permit the defendant to testify in the absence of the jury. This Court said no more than the following:

> "The United States concedes in regard to the third issue that the better practice, when admissibility of a confession is in issue, is for the judge to hear a defendant's offered testimony in the absence of the jury as to the surrounding facts. Therefore, the Government makes no objection to the reversal of the conviction on that ground. We think it clear that this defendant was entitled to such an opportunity to testify . . ." (*Id.* at p. 38)

The above-quoted language was not in constitutional terms and went only to the right of the defendant to testify in the absence of the jury. *Carignan* appears to be an expression of the supervisory authority of this Court

over the federal system. It is submitted that so long as constitutional proscriptions are not violated, a state should be permitted to develop workable rules for the conduct of its voluntariness hearings. *Cf. Ker* v. *State of California*, 374 U. S. 23, 34 (1963).

In *United States ex rel. Dickerson* v. *Rundle*, 363 F. 2d 126 (3 Cir. 1966), cited by the United States District Court in its decision here, the situation was precisely the same as in *Jackson* v. *Denno*. In short, the trial court did not pass upon voluntariness, and there, as in *Jackson*, the relief granted was not a peremptory order for a new trial as to guilt, the State of Pennsylvania being permitted first to have a hearing upon voluntariness before a judge.

There is nothing in the case of *Boles* v. *Stevenson*, 379 U. S. 43 (1964), relied upon by the courts below, which holds that the independent voluntariness hearing must be out of the presence of the jury. There this Court merely observed that "the practice in West Virginia, when an objection to a confession is interposed, is to hold a preliminary hearing out of the presence of the jury at which the trial judge fully determines the coercion issue" (*Id.* at p. 45).

While there are a few cases which, in stating the view of *Jackson* v. *Denno*, speak of the trial of the issue in absence of the jury, in each set forth in the opinions below the statement is only casual, and in none was the question here under consideration involved. *Trotten* v. *Stephens*, 241 F. Supp. 33, 47 (E. D. Ark. 1965), affirmed *sub nom. Harris* v. *Stephens*, 361 F. 2d 888 (8 Cir. 1966); *Stewart* v. *Stephens*, 244 F. Supp. 992, 992 (E. D. Ark. 1965). See also *State* v. *Owen*, 96 Ariz. 274, 394 P. 2d 206 (Sup. Ct. 1964); *Commonwealth ex rel. Gaito* v. *Maroney*, 416 Pa. 199, 204 A. 2d 758 (Sup. Ct. 1964).

A study of the jurisdictions following the Massachusetts rule discloses a lack of uniformity on the question of whether the voluntariness hearing should be out of the presence of the jury. In the State of Maryland, a pre-*Jackson* decision, *Baltimore Radio Show, Inc.* v. *State*, 67 A. 2d 497, 509 (Ct. App. 1949), holds that "it is the better practice to exclude the jury, although we have held that *it is not reversible error to deny a motion to exclude the jury, if the court subsequently rules that the confession is admissible.*" (Emphasis added.)

The United States Court of Appeals for the Ninth Circuit held in *Smith* v. *United States*, 268 F. 2d 416, 420 (9 Cir. 1959), that the preliminary hearing on voluntariness could be conducted outside the presence of the jury. But *Smith* rejected a contention on appeal that the court had erred in denying a defense request to exclude the jury. One judge, in a separate opinion, disagreed arguing that the defendant had been prejudiced by not having the hearing outside the presence of the jury.

While the highest court of the State of California has not yet spoken on this subject, there is a decision from an appellate court which holds that *Jackson* v. *Denno* does not require a hearing outside the presence of the jury. In *People* v. *Oats*, 48 Cal. Rptr. 579, 583-84 (Dist. Ct. App. 1966), it was said:

> "The upshot of our interpretation of Jackson v. Denno is that the trial judge is required to determine that constitutional requirements surrounding the making of a confession are proved before he admits the confession, and that the record must reflect this determination; but it does not require that the court hear the foundational evidence out of the presence of the jury unless the defendant so requests and so

companies his request with a showing that evidence proffered or to be adduced is inadmissible as to the question of guilt."

Chief Justice Weintraub of New Jersey recently stated that "the question whether a confession should be heard outside the presence of the jury is troublesome, wholly apart from any constitutional problem * * * when the issue is tried outside the presence of the jury, the issue must then be retried before the jury both under the orthodox and the Massachusetts rules. A replay is rarely satisfactory, for there is absent the freshness of the first cross-examination. Moreover, the burden upon all concerned, principals and witnesses, is substantial, to say nothing of the burden on the judicial process which already moves at a snail's pace in criminal matters." *State* v. *Broxton*, —— N. J. —— (1967).

An interesting problem arises in the event that the defendant makes damaging admissions with respect to voluntariness out of the presence of the jury. May the State prove them on the rerun before the jury? If not, the jury will be using a record different from the one which the trial judge used. These problems demonstrate that there is room for disagreement as to a proper and desirable approach. They also suggest that the issue is not one which the Constitution should be held to settle in only one respect. It would seem that the only constitutional requirement should be that the concept of fundamental fairness be followed. If the defendant has had a fair hearing he has been given as much constitutional protection as is required. This, it would appear, is the holding of *Jackson* v. *Denno*. It is submitted that the court below has, therefore, erroneously broadened the meaning of *Jackson* v. *Denno* and has thus decided an important question of law in a manner inconsistent with the previous holding of this Court.

POINT II

The United States Court of Appeals for the Third Circuit has rendered a decision which stands in direct conflict with established law of the State of New Jersey.

The courts below have struck down New Jersey's established procedure for the determination of the voluntariness of a confession. The decision of the United States Court of Appeals, which affirms that of the United States District Court, is in direct conflict with New Jersey law. It has long been the rule in this State that the trial judge may, in his discretion, try the issue of voluntariness in or out of the presence of the jury. *State* v. *Gruff*, 68 N. J. L. 287, 290 (E. & A. 1902); *State* v. *Fiumara*, 110 N. J. L. 164, 166 (E. & A. 1933); *State* v. *Walker*, 33 N. J. 580, 592 (1960); *State* v. *La Pierre*, 39 N. J. 156 (1963), *cert.* denied, 374 U. S. 852 (1963); *State* v. *Tassiello*, 39 N. J. 282, 291 (1963); *State* v. *Loray*, 41 N. J. 131, 136 (1963); *State* v. *Ravenell*, 43 N. J. 171, 183 (1964), *cert.* denied, 379 U. S. 982 (1965); *State* v. *Cook*, 47 N. J. 402, 411-12 (1966). In the *La Pierre* case, *supra*, the Supreme Court of New Jersey stated:

> "Bisignano asked the trial court to try the issue of voluntariness in the absence of the jury. No reason was advanced for that course, defendant simply contending the jury had to be excused.
>
> "There is disagreement elsewhere as to the propriety of taking the testimony initially in the presence of the jury. See *Meltzer*, 'Involuntary Confessions: The Allocation of Responsibility between Judge and Jury,' 21 U. Chi. L. Rev. 317, 330 (1954); Annotation 148 A. L. R. 546 (1944). The differences may well be influenced by the roles ascribed to

judge and jury in the several jurisdictions. We have but recently reiterated that the subject rests in the sound discretion of the trial court. *State* v. *Walker*, 33 N. J. 580, 592 (1960). We are not dissuaded from that view by the argument here advanced, that a judge may be influenced to admit a confession because, if it is excluded after testimony is taken in the jury's presence, there will likely be a defense motion for a mistrial.

"The question then is whether the trial court misused its discretion. We think it did not. Defendant did not point to a fair need to excuse the jury either throughout or during some stage of the hearing. Nor does it appear that the inquiry was in fact hampered by the jury's presence; and since the confession was later admitted into evidence, it was not harmful that the jury probably surmised at once the nature of the document in question." (*Id.* at pp. 171-72)

It is clear that in New Jersey an involuntary confession must be excluded from evidence, whether in fact it is true or not. *Roesel* v. *State*, 62 N. J. L. 216, 226-27 (E. & A. 1898). The philosophical basis for the rule was society's recognition that no credit should be given to a confession which is "forced from the mind by the flattery of hope or by the torture of fear . . ." *Warickshall's Case*, 1 Leach C. C. 248.

An extensive historical discussion concerning involuntary confessions is contained in the case of *State* v. *Smith*, 32 N. J. 501, 539-44 (1960). In that case a majority of the Supreme Court decided to abandon the prior approach as articulated in *State* v. *Morehous*, 97 N. J. L. 285 (E. & A.

1921), under which New Jersey adhered to the orthodox view, and to adopt the Massachusetts or "humane" view. Chief Justice Weintraub wrote in *Smith*:

> "We believe both judge and jury should operate upon the same standard. The judge should himself try the issue of voluntariness in the preliminary hearing and should exclude the confession if the State fails to prove it to be voluntary, and if he admits it into evidence, he should strike it if at a later stage involuntariness should appear. If the confession is admitted and there is proof as to involuntariness upon which reasonable men may disagree, the court should charge the jury first to consider that issue under instructions outlining the controlling legal principles and to disregard the confession if it finds the State has not proved it to be voluntary. The jury should not at any time be informed of the trial court's finding of voluntariness.
>
> "It is said that if the judge's role is not made final and exclusive, he may shirk his responsibility and abdicate in favor of a jury decision . . . If this be so, the prospect is equally great under the rule we disapprove. We are far from confident that the rule has operated with the perfection attributed to it. At any rate, we are satisfied that justice is better served by the enjoining of both court and jury each to make original findings and to abide by the command of due process that an involuntary confession must be rejected without regard to the truth of its contents." (*Id.* at pp. 559-60)

This Court spoke approvingly of the Massachusetts rule in *Jackson, supra*, and since New Jersey was categorized

as one of those jurisdictions following the Massachusetts rule (see appendix of Mr. Justice Black at p. 419), it reasonably follows that the New Jersey procedure which leaves the matter of the jury's presence to the court's discretion has been inferentially sanctioned by this Court. Of great significance is the fact that the New Jersey procedure affords greater constitutional protection than the orthodox rule would afford since the defendant gets two chances to have the confession deemed involuntary.

In the case *sub judice* the trial judge told the defendant the confession issue could be heard in or out of the presence of the jury and asked whether the defense objected to a hearing in the presence of the jury, to which counsel for defendant replied that he had no objection. The trial judge found the confession to be voluntary, and received it into evidence. The trial occurred prior to *State* v. *Smith, supra,* and hence at a time when New Jersey adhered to the orthodox rule under which the judge, and only the judge, passed upon voluntariness. The trial judge did precisely that, and in harmony with the orthodox view, instructed the jury that it could utilize the same evidence in passing upon the weight and credibility to be given the statement. The courts below not only struck the conviction of defendant Pierce, they also opened the door for what will undoubtedly be a large number of post-conviction petitions involving cases in which the voluntariness of the confession was heard in the presence of the jury.

Following the decision of the courts below, the Supreme Court of New Jersey decided the case of *State* v. *Broxton*, —— N. J. —— (decided May 29, 1967) in which the New Jersey view was again set forth and in which the decision of the United States Court of Appeals in the present case was discussed. In the course of its opinion the Supreme Court of New Jersey stated:

"We cannot find in that case [*Jackson* v. *Denno*] a holding that the Constitution is offended when a judge does what is required of him on a full and unimpeded hearing merely because a jury was present when he heard the testimony. If that is what *Pierce* v. *Pinto* means, we cannot agree with it. We of course are not bound by that decision, *State* v. *Coleman*, 46 N. J. 16, 36 (1965), *cert.* denied 383 U. S. 950, 16 L. ed. 2d 212 (1966), and although we regret a conflict of views between federal and state courts operating within the same territory, yet the primary responsibility for the criminal process in the State is ours and we would be unequal to that responsibility if we did not follow our own reading of *Jackson* v. *Denno*, especially since *Pierce* v. *Pinto* not only gives constitutional moment to something we think it not even a matter of mere error, but also because it applies its view retroactively to a case tried long before *Jackson* v. *Denno*, thereby raising the prospect of unsettling a substantial number of old convictions. In the latter regard we note that in *Sims* v. *Georgia*, —— U. S. ——, 17 L. ed. 2d 593, 598 (1967), the Court said that '*Jackson*, having been decided June 22, 1964, was binding on the court of Georgia in this case, it having been tried October 7, 1964,' thus suggesting that *Jackson* v. *Denno* should have no application to cases tried before the date of that decision. This would accord with the view of *Johnson* v. *New Jersey*, 384 U. S. 719, 16 L. ed. 2d 882 (1966), concerning the retroactive application of *Miranda* v. *Arizona*, 384 U. S. 436, 16 L. Ed. 2d 694 (1966). And finally, if perchance we do misread *Jackson* v. *Denno*, still we could not accept the anomaly cre-

ated by *Pierce* v. *Pinto*, that whereas a trial judge made no finding at all, the constitutional failure will be remedied if a finding of voluntariness is made in a new hearing before a trial court, yet, if the trial court did at the original trial make the findings required by *Jackson* v. *Denno*, then, somehow, the constitutional shortcoming can be remedied only on a retrial of the issue of guilt." (—— N. J. at p. —)

It is seen that not only does the Supreme Court of New Jersey disagree with the court below it is not disposed to follow its ruling. It is apparent that the disagreement between the United States Court of Appeals for the Third Circuit and the Supreme Court of New Jersey produces an unsettling and disrupting effect upon the orderly administration of criminal justice. For that reason, it is submitted that a decision from this Court is urgently needed in order that the serious questions here involved can be finally resolved. For the convenience and information of this Court, a complete copy of the *Broxton* opinion is set forth in the appendix herein, *infra* at pp. 13a-30a.

POINT III

The United States Court of Appeals for the Third Circuit has formulated a new rule of procedural law, not heretofore the subject of any decision of this Court, and has mistakingly made that rule retroactive in application.

In the case of *Johnson* v. *State of New Jersey*, 384 U. S. 719 (1966) this Court pointed out "the retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is

based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved" (*Id.* at p. 728).

The procedure which New Jersey follows with respect to the determination of voluntariness of a confession dates back to the year 1960. From 1960 until 1966, the year of the decision in the District Court in the present case, there were certainly hundreds of trials which proceeded under the rule which gave the trial court the discretion to conduct an independent hearing on the voluntariness issue either in or out of the presence of the jury. That procedure was and, it is urged, still is in complete accord with the requirements of the Constitution. While an accurate figure cannot be here advanced, it is reasonable to opine that if the ruling of the courts below is sustained, there will be hundreds of convictions, heretofore unimpeachable, which will be reversed on post-conviction relief. In many of those instances retrials may not be possible, and the defendants will have to be freed. This probability is precisely the kind which was sought to be avoided recently in decisions by this Court dealing with the issue of retroactivity. See *Linkletter* v. *Walker*, 381 U. S. 618 (1965); *Tehan* v. *United States, ex rel. Shott*, 382 U. S. 406 (1966). All of those cases draw a distinction between issues relating to guilt and those relating to once-valid procedures now deemed inadequate.

As previously stated, this Court's opinion in *Sims* v. *Georgia*, *supra*, strongly suggests that *Jackson* v. *Denno* should have no application to cases tried before the date of that decision. Chief Justice Weintraub has indicated that this interpretation would appear to accord with

that advanced by this Court in *Johnson* v. *New Jersey*, *supra*, regarding the retroactive application of *Miranda* v. *Arizona*, *supra*.

It is urged that this Court reconsider the decision of the courts below that it is constitutionally wrong for a voluntariness hearing to be held in front of the jury. But if this Court should not be disposed to any change, then petitioner respectfully urges that the rule of law be declared prospective only.

POINT IV

In requiring that there be a new trial on the indictment, The United States Court of Appeals has erroneously broadened this Court's rule of law as set forth in *Jackson* v. *Denno*.

In *Jackson* v. *Denno*, *supra*, the New York procedure was said to be unconstitutional and this Court ruled that the defendant was entitled to a proper hearing on voluntariness. It was stated:

> "It does not follow, however, that Jackson is automatically entitled to a complete new trial including a retrial of the issue of guilt or innocence. Jackson's position before the District Court, and here, is that the issue of his confession should not have been decided by the convicting jury but should have been determined in a proceeding separate and apart from the body trying guilt or innocence. So far we agree and hold that he is now entitled to such a hearing in the state court. But if at the conclusion of such an evidentiary hearing in the state court on the coercion issue, it is determined that Jackson's confession was voluntarily given, admissible in evidence, and prop-

> erly to be considered by the jury, we see no constitutional necessity at that point for proceeding with a new trial, for Jackson has already been tried by a jury with the confession placed before it and has been found guilty . . ." (*Id.* at p. 394).

The courts below concluded that despite the aforequoted language of *Jackson*, the petitioner in the present case must be given a new trial and that the new trial must follow the standards announced by this Court in *Miranda* v. *Arizona*, *supra*. The reason given for this holding is that the trial court communicated to the jury that it had found the confession to be voluntary.

To paraphrase the Chief Justice of New Jersey in *Broxton*, *supra*, it would be anamalous indeed if no new trial were required where a judge made no finding with respect to voluntariness but a new trial were required where he did make a finding and communicated that finding to the jury. It is submitted that the defendant here was afforded every constitutional protection to which he was entitled at the time of his trial. To now require a new trial under the standards of *Miranda* would be to ignore the holding in *Johnson* v. *New Jersey*, *supra*, which made *Miranda* prospective in application. Petitioner was afforded a voluntariness hearing. Surely it is stretching the meaning of due process and fundamental fairness to now speculate that the jury in this case was not equal to its oath and could not independently decide the issue before it. Moreover, the trial court never communicated with the jury as to the substance of the confession. That matter was exclusively the jury's. Stated differently, the guilt-determining process was unaffected by anything the trial judge may have said. The defendant is in no position to show that he was prejudiced or that he should be given an entirely new trial. The image of justice would only be clouded if such a result is permitted.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that *certiorari* should issue to review the judgment of the court below.

Respectfully submitted,

BRENDAN T. BYRNE,
County Prosecutor of Essex County,
Attorney for Petitioner.

THOMAS P. FORD, JR.,
First Assistant County Prosecutor.

BARRY H. EVENCHICK,
Assistant County Prosecutor,
Of Counsel and on the Petition.

[APPENDICES FOLLOW]

APPENDIX A

Opinion and Order of Wortendyke, Jr., U. S. D. J.

(Filed—September 29, 1966.)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION No. 564-66

UNITED STATES OF AMERICA *ex rel.*, LAWRENCE PEIRCE,

vs.

WARREN PINTO.

WORTENDYKE, District Judge:

Petitioner (Pierce) is presently serving a 16-23 year sentence pursuant to conviction, on November 25, 1959 in the Essex County Court of the State of New Jersey, for armed robbery. Petitioner is presently incarcerated in the New Jersey State Prison Farm, Rahway, New Jersey.

In this petition for a Writ of Habaes Corpus, petitioner alleges the erroneous admission into evidence of a purported confession, contending that this was a denial of due process of law under the Constitution of the United States.

Petitioner's application for Post-Conviction Relief under the Rules of Procedure of the State of New Jersey has

been denied. There is no indication that petitioner has pursued the appellate procedure in the State of New Jersey but, in any event, time for such appeal has expired. It is necessary to exhaust *only one* of several alternative State remedies. *Brown* v. *Allen*, 344 U. S. 443, 448 (1953). The statutory requirement of exhaustion of State remedies refers only to such remedies as are *still open* to the petitioner at the time he files his application for habeas corpus. *Fay* v. *Noia*, 372 U. S. 391, 399 (1963).

The transcript of petitioner's trial, at page 21, indicates that the trial court felt that it was within its discretion to hear testimony in regard to the voluntariness of the petitioner's incriminating statement in or out of the presence of the jury. The transcript also indicates that the question of voluntariness was heard and determined by the trial court in the presence of the jury. There was no objection by petitioner's counsel to this procedure. However, this procedure was erroneous. The question of voluntariness should have been heard in the absence of the jury. *United States* v. *Carignan*, 342 U. S. 36, 38 (1951) cited with approval in *Jackson* v. *Denno*, 378 U. S. 368, 395, note 23 (1964). The petitioner was entitled to a State court hearing, on the question of voluntariness of his statement, in a proceeding separate and apart from the body trying the issue of his guilt or innocence. *Jackson* v. *Denno*, *supra* at 394; cited with approval in *United States* v. *Rundle*, 363 F. 2d 126, 130 (3rd Cir. 1966) reh. denied August 15, 1966. The trial court must hear the testimony and make a determination in the absence of the jury.

These further proceedings to which I find petitioner entitled should occur initially in the State court rather than in a federal habaes corpus proceeding. The State is en-

titled to make this determination before this Court considers the question on a petition for habaes corpus. *Jackson* v. *Denno, supra* at 393.

It is, accordingly, Ordered, on this 29th day of September, 1966, that a writ of habaes corpus issue but its effectiveness stayed pending a decision of the respondent to either appeal the order of this Court or to grant petitioner an evidentiary hearing on the voluntariness of his statement. If at that hearing, it is determined that the statement, which was introduced into evidence at his trial, was voluntary and therefore admissible, a new trial will be unnecessary; however, if it is determined at that hearing that the statement was involuntary, the petitioner is required to be given a new trial with the statement, or statements, found to be involuntary, excluded. Failing this, the petitioner is entitled to be released. See *United States* v. *Rundle, suprat* at 130.

Reynier J. Wortendyke, Jr.
Judge, United States District Court

APPENDIX B

Supplemental Opinion and Order on Respondent's Motion for Reargument and Petitioner's Application to Amend Opinion Filed September 29, 1966

WORTENDYKE, District Judge:

This Court's Opinion and Order in this cause was filed on September 29, 1966, after deliberate study of the pertinent portions of the trial record and without having held a hearing. This procedure, of course, was proper. *Brown* v. *Allen*, 344 U. S. 443, 463 (1953). Subsequently, on October 3, 1966, the respondent moved for reargument. This motion was granted in the light of the significant Constitutional question involved. Thereafter, on October 10, 1966, petitioner filed a "Petition for Rehearing or Certificate of Probable Cause (In Forma Pauperis)". This Supplemental Opinion and Order will address itself to both the contentions urged by the respondent upon the return date of the motion for reargument and the further relief sought by the petitioner in his new application.

RESPONDENT'S REARGUMENT

Respondent asserted the following contentions: (1) petitioner has not exhausted available State remedies; (2) the New Jersey procedure comports with the due process requirements of the Fourteenth Amendment; (3) the decision in *Pierce* should not be retroactive; (4) the Constitutional requirement is satisfied if the Court, with the jury present, in fact found the confession to have been vountary; and (5) since a new trial is not required, the decision of *Miranda* v. *Arizona*, 384 U. S. 436 (June 13, 1966) is not applicable.

Appendix B

I find no merit in the first four contentions urged by the respondent. It is clear, not only upon the authority of *United States* v. *Carignan*, 342 U. S. 36, 38 (1951); *Jackson* v. *Denno*, 378 U. S. 368, 376-377 (1964); and *United States* v. *Rundle*, 363 F. 2d 126, 130 (3rd Cir. 1966), but also upon the additional authorities cited imediately hereafter, that failure of the trial court to conduct an initial, independent hearing, out of the presence of the jury, to determine the *admissibility* of a confession by resolving the question of voluntariness is a denial of due process within the intendment of the Fourteenth Amendment. *Boles* v. *Stevenson*, 379 U. S. 43, 45 (1964); *United States* v. *Rundle*, 238 F. Supp. 218, 220 (E. D. Pa. 1965); *Mitchell* v. *Stephens*, 353 F. 2d 129, 144 (8th Cir. 1965) cert. denied 384 U. S. 1019 (1966); *Trotter* v. *Stephens*, 241 F. Supp. 33, 46 (E. D. Ark. 1965); *Stewart* v. *Stephens*, 244 F. Supp. 982, 993 (E. D. Ark. 1965) aff'd on other grounds 311 F. 2d 691 (8th Cir. 1963) sub nom. *Henslee* v. *Stewart*. However, as to the fifth point urged by respondent, that since a new trial is not required the decision of *Miranda* v. *Arizona*, *supra*, is not applicable, I am not convinced that this is so. *Miranda* must be followed in a retrial held after June 13, 1966 even though the original trial was held before that date. *Gibson* v. *United States*, 363 F. 2d 146, 148 (5th Cir. 1966). This being so, it appears that the State of New Jersey would be bound to adhere to the dictates of *Escobedo* v. *Illinois*, 378 U. S. 478 (1964) and *Miranda* in the event of a new hearing for petitioner in regard to the involuntariness claim. "Thus while *Escobedo* and *Miranda* provide important new safeguards against the use of unreliable statements at trial, the nonretroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the

same safeguards as part of the involuntariness claim." *Johnson* v. *New Jersey*, 384 U. S. 719, 730 (1966).[1]

Further Relief Sought by Petitioner

Petitioner seeks alternatively the following: (1) a new trial because he asserts that the trial court prejudicially influenced the jury by its remarks as to voluntariness, (2) an amendment of this Court's Order to provide that petitioner is entitled to an evidentiary hearing in accordance with the safeguards of *Escobedo* v. *Illinois, supra,* and *Miranda* v. *Arizona, supra,* upon his involuntariness claim, and (3) allowance of a certificate of probable cause, pursuant to 28 U. S. C. §2253.[2]

In this Court's Opinion and Order, filed September 29, 1966, I held that the petitioner was entitled to an evidentiary hearing on the voluntariness of his statement. I further held that if it was determined upon such hearing that the statement was voluntary and therefore admissible, a new trial would be unnecessary. In so holding I sought to adhere to the directives of *Jackson* v. *Denno, supra,* and *United States* v. *Rundle, supra.* However, upon further study of these two cases both prior and subsequent to the

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[1] This observation is academic in view of what I decide hereafter.

[2] Petitioner also claimed that the trial court's hearing of testimony on voluntariness in the presence of the jury resulted in compulsory testimony by petitioner in violation of his Constitutional protection against self-incrimination. Neither under the facts of this case, nor in the disposition of it, do I see need to decide this contention. Petitioner himself voluntarily testified upon this hearing, with the advice of counsel. I do not intimate, though, that under a proper set of facts, this would not be a justiciable question.

reargument of this cause, I find both *Jackson* and *Rundle* distinguishable from this case.

Significantly, in both *Jackson* and *Rundle*, the question of voluntariness was submitted to the jury along with other evidence in the respective cases, *but in the absence of a prior independent determination of admissibility upon the voluntariness issue.* In the instant case, although, as I conclude, improperly, the trial judge *did make* a determination and this determination was communicated to the jury and went with them to the jury room. In both *Jackson* and *Rundle*, the Courts based their respective decisions on the fact that the question of voluntariness was submitted to the trial court having made a *prior* determination as to the *admissibility* of such confession (giving due consideration to the voluntariness question in arriving at the admissibility determination). It was therefore held in those two cases that the grant of an independent hearing on the admissibility-voluntariness question would be sufficient to insure the proper application of Constitutional principles to the trials of the respective defendants. Those two cases further held that in the event the confessions were deemed admissible-voluntary upon conclusion of the new hearing, it could not be said that the respective defendants had suffered a deprivation of Constitutional protections as the result of said confessions having been considered by the jury. However, in the instant case, the trial judge *did* make a determination, and communicated his finding to the jury.

Even if the petitioner is granted a new hearing, and upon this hearing the confession is deemed to have been admissible-voluntary, it cannot be said that therefore the submission of the confession to the jury constituted no Constitutional harm to petitioner, because it cannot be de-

termined, with any degree of certainty, what effect the trial judge's unconstitutional procedural conduct had upon the jury's ultimate determination of facts. The Constitutional error cannot be cured by affording to petitioner merely an independent evidentiary hearing. The effect upon the jury of the trial judge's disclosed determination cannot be assessed with sufficient certainty to insure that petitioner's trial comported with due process.[a]

I am mindful that the Court in *Jackson*, at page 395, stated that the State is free to grant a new trial *if it so chooses*, but that this should not be required before the outcome of the new hearing on voluntariness is known. However, this case is factually distinguishable from *Jackson*, as stated above. The petitioner should not be required to raise again in the State courts a question which has already been raised there and decided adversely to him. See *United States* v. *Rundle*, 214 F. Supp. 549, 554 (E. D. Pa. 1963) aff'd 337 F. 2d 268, 272 (3rd Cir. 1964).

Having thus considered both the respondent's contentions on reargument and the application of the petitioner, it is on this 28th day of October, 1966, ORDERED that the relief prayed for in the motion of the respondent be and hereby is denied. It is further ORDERED that the application of petitioner for a new trial is granted. Upon the retrial of petitioner, the State of New Jersey shall adhere to the safeguards of *Escobedo* and *Miranda* in regard to the involuntariness claim. *Gibson* v. *United States, supra.*

REYNIER J. WORTENDYKE, JR.
Judge, United States District Court

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[a] The Supreme Court of New Jersey has disapproved of the practice of a trial judge informing the jury of his finding on the admissibility-voluntariness question. *State* v. *Smith*, 32 N. J. 501, 549-560, 161 A. 2d 520, 545-546, 551 (1960) cert. denied 364 U. S. 936 (1961); *State* v. *Walker*, 33 N. J. 580, 593, 166 A. 2d 567, 574 (1960) cert. denied 371 U. S. 850 (1962) *sub nom. Walker* v. *New Jersey*. See *Jackson* v. *Denno, supra* at 404, note 7.

APPENDIX C

Per Curiam Opinion of U. S. Court of Appeals

(Filed—March 28, 1967.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16330

UNITED STATES OF AMERICA, *ex rel.*
LAWRENCE PIERCE,

Appellee,

v.

WARREN PINTO, Superintendent, New Jersey State Prison Farm, Rahway, New Jersey,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Submitted March 9, 1967
Before McLAUGHLIN, HASTIE AND FREEMAN, *Circuit Judges*

Appendix C

Opinion of the Court

(Filed—March 28, 1967.)

Per Curiam.

Appellee was convicted of the crime of robbery in a New Jersey court. He made application for a writ of habeas corpus to the United States District Court for the District of New Jersey. He sought a new trial because the testimony in regard to the voluntariness of his incriminating statement was heard and determined by the trial judge in the presence of the jury. The District Court granted the writ and allowed the petitioner a new trial on the merits. The decision was plainly right.

The Judgment of the District Court will be affirmed on the sound opinion of Judge Wortendyke which was filed September 29, 1966.

A True Copy:
Teste:

Thomas F. Quinn
Clerk of the United States Court of
Appeals for the Third Circuit.

APPENDIX D

Judgment of U. S. Court of Appeals

(Filed—March 28, 1967.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16330

UNITED STATES OF AMERICA, *ex rel.* LAWRENCE PIERCE,

vs.

WARREN PINTO, Superintendent, New Jersey State Prison Farm, Rahway, New Jersey,
(D. C. CIVIL No. 564-66)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: McLAUGHLIN, HASTIE and FREEDMAN,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted on briefs.

Appendix D

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 28, 1966, be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN
Clerk

March 28, 1967

APPENDIX E

Opinion of Supreme Court of New Jersey in *State v. Broxton and Ogburn*

(Filed—May 29, 1967)

SUPREME COURT OF NEW JERSEY
A-153 SEPTEMBER TERM 1966

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERT BROXTON,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LARRY OGBURN,

Defendant-Appellant.

Argued May 8, 1957—Decided May 29, 1967.

On appeal from the Essex County Court, Law Division.

Mr. Charles E. Villanueva argued the cause for defendant-appellant Broxton.

Appendix E

Mr. Edward G. D'Alessandro argued the cause for defendant-appellant Ogburn.

Mr. Barry H. Evenchick, Assistant Prosecutor, argued the cause for plaintiff-respondent (*Mr. Brendan T. Byrne*, Essex County Prosecutor, attorney).

The opinion of the Court was delivered by
WEINTRAUB, C.J.

This case arose out of a savage attack upon a young woman taken at gunpoint from her automobile in front of her home. There were four youthful assailants. One was dealt with as a juvenile. The others were tried before a jury upon indictments for rape, robbery and atrocious assault and battery. The appellants, Broxton and Ogburn, were convicted on all charges. The defendant Clark, convicted of rape and robbery but acquitted of atrocious assault and battery did not appeal. We certified the appeals before argument in the Appellate Division.

I.

The first issue is whether it was error to try defendants jointly. The joinder was expressly authorized by R.R. 3:4-8 and 3:5-6. A severance may be had if prejudice may ensue from a joint trial, R.R. 3:5-7, and the question is whether the trial court misused its discretion in refusing to order separate trials.

The claim of prejudice rests upon the circumstance that the State introduced the confessions of the defendants, each of which referred to the activity of three other associates in the offenses. The trial court excised all references which would identify another defendant as we held must be done in *State* v. *Young*, 46 N. J. 152 (1965). The jury

was instructed at the time each confession was admitted and also in the charge at the end of the case that a confession could be used only against the defendant who gave it and that it should indulge in no speculation with respect to the excisions the court had ordered. Nonetheless defendants say they were harmed by each other's written statement.

The confessions were in essence mutually consistent, and none was exculpatory at the expense of another defendant. With the excisions referred to, the confessions agreed with the testimony of the victim and of the juvenile offender mentioned above who testified for the State, and as well with the facts otherwise established. That the crimes occurred was not questioned by the defense. No one disputed the fact that the victim was taken at gunpoint from her automobile and forced into a stolen car occupied by four males; that she was taken to a vacant flat where she was raped seven times; that she was brutally beaten about the face and head with the butt of the gun and her nose fractured; that a lighted cigarette was applied to her thigh; that her money and wristwatch were taken from her; that while her captors were thereafter transporting her in the stolen car, the owner of the car gave chase, as a result of which the assailants fled from the vehicle and their victim was rescued by the pursuers and the police. None of this was challenged. Rather each defendant testified that he was beaten into accepting a story the police gave him and that in fact he was elsewhere at the time of the crime.

Thus, beyond implicating the individual who signed the confession, each statement served only to confirm the occurrence of the criminal events in terms that were not disputed. The only real issue as to each defendant was whether he was one of the four offenders. After the ex-

cisions, there remained nothing in any confession which on its face or because of some collateral circumstance identified any other defendant as one of the culprits. This being so, we see no reason to doubt the ability of the jury to comply with the trial court's instruction that the confession may bear against only the defendant who gave it. See, *State* v. *Johnson*, 31 N. J. 489, 506-507 (1960), appeal dismissed, 368 U. S. 145, 7 L. Ed. 2d 188 (1961), *cert.* denied 368 U. S. 933, 7 L. ed. 2d 195 (1961); *State* v. *Ordog*, 45 N. J. 347 (1965), *cert.* denied, 384 U. S. 1022, 16 L. ed. 2d 1025 (1966); *State* v. *Green*, 46 N. J. 192, 197 (1965), *cert.* denied, 384 U. S. 946, 16 L. ed. 2d 544 (1966).

II.

Each defendant attacks the trial court's finding that his confession was admissible. We see no substance to the claim.

Defendants further contend the trial court erred in hearing the testimony as to voluntariness in the presence of the jury. It has long been the rule in this State that the trial judge may, in his discretion try that issue in or outside the presence of the jury. *State* v. *Gruff*, 68 N. J. L. 287, 290 (E. & A. 1902); *State* v. *Fiumara*, 110 N. J. L. 164, 166 (E. & A. 1933); *State* v. *Walker*, 33 N. J. 580, 592 (1960); *State* v. *La Pierre*, 39 N. J. 156 (1963), cert. denied, 374 U. S. 852, 10 L. ed. 2d 1073 (1963); *State* v. *Tassiello*, 39 N. J. 282, 291 (1963); *State* v. *Loray*, 41 N. J. 131, 136 (1963); *State* v. *Ravenell*, 43 N. J. 171, 183 (1964), *cert.* denied, 379 U. S. 962, 13 L. ed 2d 572 (1965); *State* v. *Cook*, 47 N. J. 402, 411-12 (1966). Wigmore speaks of the practice in permissive terms, saying the jury "may be withdrawn." 3 *Wigmore, Evidence* (3d ed. 1940), § 861, p. 349. In *State* v. *La Pierre*, we said (39 N. J. at 171-72):

Appendix E

"Bisignano asked the trial court to try the issue of voluntariness in the absence of the jury. No reason was advanced for that course, defendant simply contending the jury had to be excused.

"There is disagreement elsewhere as to the propriety of taking the testimony initially in the presence of the jury. See Meltzer, 'Involuntary Confessions: The Allocation of Responsibility between Judge and Jury,' 21 *U. Chi. L. Rev.* 317, 330 (1954); Annotation 148 *A. L. R.* 546 (1944). The differences may well be influenced by the roles ascribed to judge and jury in the several jurisdictions. We have but recently reiterated that the subject rests in the sound discretion of the trial court. *State* v. *Walker*, 33 N. J. 580, 592 (1960). We are not dissuaded from that view by the argument here advanced, that a judge may be influenced to admit a confession because, if it is excluded after testimony is taken in the jury's presence, there will be likely to be a defense motion for a mistrial.

"The question then is whether the trial court misused its discretion. We think it did not. Defendant did not point to a fair need to excuse the jury either throughout or during some stage of the hearing. Nor does it appear that the inquiry was in fact hampered by the jury's presence; and since the confession was later admited into evidence, it was not harmful that the jury probably surmised at once the nature of the document in question."

In the case at hand, the trial court asked counsel to state the basis for the request that the jury be excluded. The sole reason given was that if the court should ultimately

exclude the statement the jury would nonetheless have apprehanded its import. There was no suggestion that any defendant would be hampered in his attack upon the confession because of the jury's presence. In fact each defendant testified in the hearing upon the admissibility of his confession. There was no interrogation as to guilt or innocence. There was no prior conviction of crime, and there was no reference to the juvenile records of these men, which records, under our practice, cannot be proved at any stage to assail credibility. Thus the sole objection to the presence of the jury was and remained that there might be harm if the statement should be excluded. That eventuality did not occur, and hence we see no basis for a claim of error.

But defendants say *Jackson* v. *Denno*, 378 U. S. 368, 12 L. ed. 2d 908 (1964), holds that the admissibility of a confession must be tried outside the presence of the jury. To support their claim defendants cite *United States ex rel. Pierce* v. *Pinto*, 259 F. Supp. 729 (D. N. J. 1966), affirmed, 374 F. 2d 472 (3 Cir. 1967). We find nothing in *Jackson* v. *Denno*, or in the nature of the subject, to support the view that the Constitution requires that procedure in each and every case.

As a backdrop to this discussion, it is well to state briefly the several approaches to the trial of the voluntariness of a confession prior to *Jackson* v. *Denno*. Three views then commanded extensive support. One was the so-called orthodox view, under which the issue of voluntariness is wholly for the judge, the jury passing only upon the credibility of the confession. Wigmore thought any other concept was "heresy," because he deemed voluntariness to bear upon admissibility and admissibility traditionally is no concern of a jury. 3 *Wigmore, Evidence* (3d ed. 1940), § 861. None-

theless, as Wigmore recognized and the citations in *Jackson* v. *Denno* make evident, there were many adherents to two other procedures. One, which we will call the "New York" view for convenience, left voluntariness to the jury with instructions to disregard the confession if not found to be voluntary. Under that view the trial judge did not himself decide a disputed issue of fact. This is the approach condemned in *Jackson* v. *Denno*. The remaining approach, called the "Massachusetts" or "humane" rule, requires both the judge and the jury to pass upon voluntariness, both obligated to reject the confession if it is involuntary. Under all of the foregoing approaches the evidence upon the issue ultimately goes to the jury, the difference being that under the orthodox view, the jury is concerned only with its impact upon the credibility of the contents of the confession, whereas under the two "heretical" approaches, the jury is charged not to use the contents of the confession, however credible, unless the confession is found to be voluntary. Prior to May 23, 1960 we followed the orthodox rule. On that day a majority of our Court, concluding that the Massachusetts rule afforded greater protection for the accused, embraced that doctrine, but only for prospective application. *State* v. *Smith*, 32 N. J. 501, 557 (1960).

Jackson v. *Denno* did not involve the question whether the trial judge may hear the issue of voluntariness in the presence of the jury. This must be obvious since in that case the trial judge did not try the issue at all, for under the doctrine there applied, the jury alone passed upon voluntariness. It was precisely because the trial judge did not decide the question that the majority in *Jackson* v. *Denno* found the procedure to be bad. More specifically, the majority believed it to be wrong to leave voluntariness to the jury alone because (1) there was no way to know whether

all the jurors found the confession to be voluntarily, and (2) there was the danger that the lay, untrained mind of a juror would use the confession even if it were found involuntary. The majority therefore concluded that the constitutional value involved could not be protected unless a judge (or a jury specially empaneled for that purpose alone, see fn. 19, 378 U. S. at 391, 12 L. ed. 2d at 924) passed upon the issue. In keeping with that view, the majority concluded that the defendant was not entitled to a retrial of the issue of guilt if upon remand a judge should find the confession was voluntary.

Now, let us turn to *Pierce* v. *Pinto*, *supra*, in which the United States District Court apparently held our practice was outlawed by *Jackson* v. *Denno*. In *Pierce*, the defendant was sentenced on December 16, 1959 for armed robbery. He took no appeal. About six years later he sought post-conviction relief in the State court on the ground that his confession was involuntary. His application was denied. Again he did not appeal, but instead sought relief by *habeas corpus* in the United States District Court where he prevailed.

As we understand the situation in *Pierce*, the trial judge in the robbery case told the defendant the confession issue could be heard in or outside the presence of the jury, and asked whether the defense objected to a hearing in the presence of the jury, to which counsel for defendant replied that he had no objectiton. The trial judge found the confession to be voluntary, and received it into evidence. The trial occurred prior to *State* v. *Smith*, *supra*, and hence at a time when New Jersey adhered to the orthodox rule under which the judge, and only the judge, passed upon voluntariness. The trial judge did precisely that, and in harmony

with the orthodox view, instructed the jury that it could utilize the same evidence in passing upon the weight and credibility to be given the statement. We gather, too, that in the post-conviction application to the State trial court, Pierce did not tender the issue upon which he prevailed in the federal court, *i.e.*, that *Jackson* v. *Denno* held that a trial judge's finding of voluntariness is vitiated because he and the jury heard the testimony at the same time. At any rate, taking that view of *Jackson* v. *Denno*, the Federal District Court found for Pierce.

In so finding for Pierce, the Federal District Court ruled that the State of New Jersey need not give the defendant a new trial as to guilt if the confession should be found voluntary in a new hearing before a judge. That was the mandate in *Jackson* v. *Denno*, but in *Pierce*, unlike *Jackson* v. *Denno*, a trial judge had already decided the issue of admissibility and hence it would seem merely ritualistic to ask another judge to rerun the course. Both the State and Pierce sought reargument. In his petition, Pierce added something new, pointing out that the trial judge had told the jury that he found the confession was voluntary. He contended that that circumstance required a new trial upon the issue of guilt. Thereupon the Federal District Court supplemented its prior opinion, recognizing that, unlike *Jackson* v. *Denno*, "in the instant case the trial judge *did* make a determination, and communicated his finding to the jury," and concluding that anything less than a new trial could not cure the constitutional hurt. We are not sure we understand wherein the constitutional injury was finally found to repose. Specifically we cannot tell whether the wrong lay in (1) the presence of the jury or (2) the trial judge's communication of his finding of voluntariness to the jury. The brief, unsigned opinion of the Third Circuit

refers only to the first item, saying that Pierce sought a new trial "because the testimony in regard to the volunariness of his incriminating statement was heard and determined by the trial judge in the presence of the jury" and stating, without more, that the District Court's "decision was plainly right."

If *Pierce* v. *Pinto* turned upon the trial court's comment to the jury upon voluntariness, it would not be relevant here, because in the matter before us the trial court made no such comment. Although obviously the Federal District Court found constitutional moment in that circumstance, the Third Circuit apparently did not, but on the chance that we misread its opinion, we digress to say we see no constitutional problem in the fact that the trial judge did acquaint the jury with his finding. Surely *Jackson* v. *Denno*, which was concerned only with the absence of a trial court finding upon voluntariness, did not deal with the question whether the trial court could constitutionally inform the jury of its finding upon voluntariness, an issue which under the orthodox view the jury may not even consider as such.[1]

Whether, under either the orthodox or Massachusetts rules, the trial court should tell the jury of its findings comes within the separate subject of the propriety of comment upon jury issues. New Jersey recognizes a broad power in a trial court to express its views on the evidence, so long as the jury is plainly told the issue of fact remains its final responsibility. *State* v. *Begyn*, 34 N. J. 35, 53 (1961); *State* v. *Smith*, 43 N. J. 67, 77 (1964), *cert.* denied, 379 U. S. 1005,

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[1] The sole reference we find is in the dissenting opinion of Mr. Justice Black which assumes that the trial judge will, or may, tell the jury of its opinion or finding. *Fn.* 7, 378 U. S. at 404, 12 *L. ed.* 2d 932.

13 L. ed. 2d 706 (1965), rehearing denied, 380 U. S. 938, 13 L. ed. 2d 826 (1965). This was the orthodox view of the common law, and although in many jurisdictions the trial judge has been deprived of that authority, Wigmore notes correctly that "in New Jersey the orthodox rule bravely survives." 9 *Wigmore, Evidence* (3d ed. 1940), §2551, p. 505, n. 3. So too in the Third Circuit. *United States* v. *Kravitz*, 281 F. 2d 581, 584-85 (3 Cir. 1960), *cert.* denied, 364 U. S. 941, 5 L. ed. 2d 372 (1961). When in *State* v. *Smith*, *supra*, 32 N. J. at 549, we said as a "word of caution for future guidance," that a trial judge should not tell the jury he found the confession voluntary, we did not do so because we thought the Constitution so commanded or even because we thought it would necessarily be reversible error so to inform the jury. *Cf. State* v. *Walker*, *supra*, 33 N. J. at 593-94. Rather we thought it to be merely a better exercise of discretion. We have found no case holding that the subject of comment is now in the deadly grip of some deathless view of the Constitution.

To return to the proposition that the Constitution forbids a trial court from hearing the issue of voluntariness in the presence of the jury—the thesis initially embraced by the District Court and apparently thereafter by the Third Circuit—we should add that we see no support for that proposition in the other cases cited by the District Court in its opinion.

In *United States* v. *Carignan*, 342 U. S. 36, 96 L. ed. 48 (1951), the alleged error reposed in the refusal to permit the defendant to testify in the absence of the jury (p. 51). The Court said no more than this (342 U. S. at 39, 96 L. ed. at 51):

Appendix E

> "The United States concedes in regard to the third issue that *the better practice*, when admissibility of a confession is in issue, is for the judge to hear a defendant's offered testimony in the absence of the jury as to the surrounding facts. Therefore, the Government makes no objection to the reversal of the conviction on that ground. We think it clear that this defendant was entitled to such an opportunity to testify * * *." (Emphasis ours.)

We stress that the proposition was not cast in constitutional terms, and that the holding in any event went only to the right of a defendant himself to testify in the absence of the jury. Neither in *Pierce* nor in the case at hand did the defendant ask for *that* opportunity or suggest any reason why he did not want the jury to hear him, and here, and also in *Pierce*, the defendants did testify.

In *United States ex rel. Dickerson* v. *Rundle*, 363 F. 2d 126 (3 Cir. 1966), cited by the District Court in *Pierce*, the situation was precisely the same as in *Jackson* v. *Denno*, i.e., that the trial court did not pass upon voluntariness, and there, as in *Jackson* v. *Denno*, the relief granted was not a peremptory order for a new trial as to guilt, the State of Pennsylvania being permitted first to have a hearing upon voluntariness before a judge.

Nor is the District Court supported by *Boles* v. *Stevenson*, 379 U. S. 43, 45, 13 L. ed. 2d 109, 111 (1964), cited in its opinion on rehearing. There the Court merely observed that "the practice in West Virginia, when an objection to a confession is interposed, is to hold a preliminary hearing out of the presence of the jury at which the trial judge fully determines the coercion issue." Al-

though there are a few cases which in stating the view of *Jackson* v. *Denno* speak of a trial of the issue in absence of a jury, in all the statement is only casual, and in none was the question involved. *Trotten* v. *Stephens*, 241 F. Supp. 33, 47 (E. D. Ark. 1965), affirmed *sub nom. Harris* v. *Stephens*, 361 F. 2d 888 (8 Cir. 1966); *Stewart* v. *Stephens*, 244 F. Supp. 982, 992 (E. D. Ark. 1965); *State* v. *Owen*, 96 Ariz. 274, 394 P. 2d 206 (Sup. Ct. 1964); *Commonwealth* v. *Moroney*, 416 Pa. 199, 204 A. 2d 758 (Sup. Ct. 1964). On the other hand, *People* v. *Oats*, 48 Cal. Rptr. 579, 583-84 (Dist. Ct. App. 1966), holds flatly that *Jackson* v. *Denno* does not require a hearing outside the presence of the jury, saying that such a hearing should be granted if the defendant so requests and supports the request with a showing that evidence will be offered which will be inadmissible on the question of guilt. We note also that after the District Court decision in *Pierce* and before the Third Circuit decided that case, another judge of the same District Court held that *Jackson* v. *Denno* did not warrant relief where in fact the confession was admitted into evidence and there was no unfairness to the defendant. *Brown* v. *State of New Jersey* (Civil No. 1162-65).

On principle we see no tenable ground to declare that the presence of a jury must vitiate a trial court's finding as to voluntariness. As we noted above, no reason was given for the request for a hearing outside the presence of the jury other than the possibility, which did not eventuate, that the confessions might be excluded. To strike down the trial court's finding merely because the jury was present is to assume that the jury's presence somehow taints the ability of the judge to discharge his duty. Although judges at times doubt that a juror can obey limiting instructions, they do not question their own ability to do what the law

requires. Nor could they without destroying the judicial process. Surely no one would say, for example, that a judge sitting without a jury may not try a case involving a challenged confession, or that appellate judges cannot deal with that issue unless they are insulated from evidence bearing upon guilt. Yet that seems to be the footing of *Pierce* v. *Pinto*, unless we misread it.

The question whether a confession should be heard outside the presence of the jury is troublesome, wholly apart from any constitutional problem.[2] We recently placed on the agenda for the Judicial Conference the question whether the admissibility of a confession should be decided on a motion before trial. See, *State* v. *Green*, N. J. (1967). There are obvious advantages and disadvantages in a separate hearing either before or at trial. See, Meltzer, "Involuntary Confessions: The Allocation of Responsibility between Judge and Jury," 21 *U. Chi. L. Rev.* 317, 330-31 (1954). It may be well for the State and defense to know before trial whether the confession will come in, and in some cases it may be desirable to permit interlocutory review. But on the other hand, when the issue is tried outside the presence of the jury, the issue must then be retried before the jury under the orthodox and the Massachusetts rules. A replay is rarely as satisfactory, for there is absent the freshness of the first cross-examina-

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[2] We expect shortly to promulgate the Rules of Evidence heretofore proposed pursuant to the Evidence Act, 1960, N.J.S. 2A:84A-33 *et seq.* The rules, which will become effective September 11, 1967, will provide that, if requested, the hearing on admissibility shall be held outside the presence of the jury (Rule 8(3)). That provision, of course, will apply only to cases tried after the effective date. N.J.S. 2A:84A-42.

tion. Moreover, the burden upon all concerned, principals and witnesses, is substantial, to say nothing of the burden on the judicial process which already moves at a snail's pace in criminal matters. In the case before us, the trial of the issue of voluntariness covers some 650 pages of transcript. Realistically, most confessions are admissible, and to encumber all cases with two trials of the same issue because of the danger of a mistrial in a few may be too heavy a price to exact from all concerned. Moreover, several trials of the same issue may present difficult questions. If in testifying in the absence of the jury, the defendant makes damaging admissions with respect to voluntariness, may the State prove them on the rerun before the jury? If not, the jury will be using a record different from the one the trial judge used. And what should be done if a defendant who does not testify on the preliminary hearing decides to testify before the jury, or if he offers before the jury other evidence not submitted to the trial judge alone?

We mention these facets to indicate the room for earnest disagreement, and to suggest that it is not the kind of a problem that a Constitution should be held to settle in only one way. Rather the Constitution can be asked to say no more than this: that the practice shall be such as to permit a fair hearing upon the voluntariness of confession, and if that is had, it matters not at all whether it was achieved in or outside the presence of the jury. *Jackson* v. *Denno* says nothing more.

We cannot find in that case a holding that the Constitution is offended when a judge does what is required of him on a full and unimpeded hearing merely because a jury was present when he heard the testimony. If that is

what *Pierce* v. *Pinto* means, we cannot agree with it. We of course are not bound by that decision, *State* v. *Coleman*, 46 N. J. 16, 36 (1965), *cert. denied*, 383 U. S. 950, 16 L. ed. 2d 213 (1966), and although we regret a conflict of views between federal and state courts operating within the same territory, yet the primary responsibility for the criminal process in the State is ours and we would be unequal to that responsibility if we did not follow our own reading of *Jackson* v. *Denno*, especially since *Pierce* v. *Pinto* not only gives constitutional moment to something we think is not even a matter of mere error, but also because it applies its view retroactively to a case tried long before *Jackson* v. *Denno*, thereby raising the prospect of unsettling a substantial number of old convictions. In the latter regard we note that in *Sims* v. *Georgia*, —— U. S. ——, 17 L. ed. 2d 593, 596 (1967), the Court said that "*Jackson*, having been decided June 22, 1964, was binding on the court of Georgia in this case, it having been tried October 7, 1964," thus suggesting that *Jackson* v. *Denno* should have no application to cases tried before the date of that decision. This would accord with the view of *Johnson* v. *New Jersey*, 384 U. S. 719, 16 L. ed. 882 (1966), concerning the retroactive application of *Miranda* v. *Arizona*, 384 U. S. 436, 16 L. ed. 2d 694 (1966). And finally, if perchance we do misread *Jackson* v. *Denno*, still we could not accept the anomaly created by *Pierce* v. *Pinto*, that whereas when a trial judge made no finding at all, the constitutional failure will be remedied if a finding of voluntariness is made in a new hearing before a trial court, yet, if the trial court did at the original trial make the findings required by *Jackson* v. *Denno*, then, somehow, the constitutional shortcoming can be remedied only on a retrial of the issue of guilt.

Appendix B

III.

Defendant Broxton contends the trial court erred in refusing to entertain an objection, first made at trial, to the introduction into evidence of a gun seized when he was arrested. Our rules provide that a motion to supress for an alleged violation of the Fourth Amendment must be made before trial and may be made at trial only if the court finds it could not reasonably have been made prior thereto. *R.R.* 3:2A-6(a); *State* v. *Campisi* __ *N.J.* __ (1967). The rule is reasonable and must be met if there is to be order in the judicial process. Defendant could give no reason for omitting to make a timely motion to suppress.

In any event, defendant's own testimony reveals there was no basis for a motion. Two detectives searching for Broxton went to the home of his sister. They were admitted into the kitchen by the sister. When they asked for Broxton, she called him. According to Broxton, when he entered the kitchen the detectives directed him to come with them. Instead Broxton left the kitchen, he says to get his coat and also to get rid of the gun which was in his pants pocket. A detective promptly followed and, as Broxton himself said, the detective saw the gun fall to the floor as Broxton sought to get it out of his pocket. The gun, a starter's pistol, was the weapon Broxton had used upon the victim. We see no semblance of an issue.

IV.

The final point relates to the prosecutor's summation. Although, as noted above, no one really disputed the multiple rape of the victim, counsel for one defendant tried to make something in his summation of the fact that no one testified that an internal examination of the victim re-

vealed seminal fluid, thereby to support the victim's testimony as to penetration. In the context of this trial, the absence of such testimony was quite meaningless, especially since the victim was a married woman and a nurse. The prosecutor's reply was to the point, and although not phrased with elegance, it was not inflammatory.

The judgments are affirmed.

SUPREME COURT OF THE UNITED STATES

October Term, 1967

PINTO, SUPERINTENDENT, NEW JERSEY STATE PRISON FARM v. PIERCE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 294. Decided October 23, 1967.

PER CURIAM.

Respondent was indicted by the grand jury of Essex County, New Jersey, on July 2, 1959, for the crime of robbery while armed. Following a plea of not guilty, he was tried before a jury, convicted and sentenced to a term of from 16 to 23 years in the New Jersey State Prison. On June 6, 1966, respondent filed a petition for a writ of habeas corpus in the United States District Court for the District of New Jersey. The District Judge determined from the transcript of respondent's trial that the trial court had heard in the presence of the jury testimony regarding the voluntariness of incriminating statements sought to be introduced by the prosecution, held that under prior decisions of this Court this procedure violated respondent's constitutional rights and granted the writ. The Court of Appeals for the Third Circuit affirmed, and petitioner, the Superintendent of the New Jersey State Prison Farm, seeks a writ of certiorari.

The petition for certiorari is granted and the judgment is reversed. This Court has never ruled that all voluntariness hearings must be held outside the presence of the jury, regardless of the circumstances. *Jackson v. Denno*, 378 U. S. 368 (1964), held that a defendant's constitutional rights are violated when his challenged confession is introduced without a determination by the trial judge of its voluntariness after an adequate hearing. A confession by the defendant found to be involuntary by the

trial judge is not to be heard by the jury which determines his guilt or innocence. Hence, because a disputed confession may be found involuntary and inadmissible by the judge, it would seem prudent to hold voluntariness hearings outside the presence of the jury.[1] In this case, however, the confession was held voluntary and admitted as evidence suitable for consideration by the jury. In addition, there is no claim that because the hearing was held in the presence of the jury it was inadequate or had any other unfair consequences for the respondent.[2]

Finally, it is clear that the respondent in this case did not object to having the voluntariness of his admission considered in the presence of the jury. At his trial the court asked defense counsel whether there was any objection to the testimony being taken in the presence of the jury. Defense counsel replied, "None whatsoever." The court continued, "As you know, it can be taken in their presence or outside of their presence, and that is a matter of discretion with the Court but I am inquiring of you if you have any objections. If you did I would hear you but I assume you have none." Again counsel replied, "I have none." The evidence regarding voluntariness, which included testimony by respondent, was then taken, after which the court ruled that the statement was voluntary.

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[1] The New Jersey Supreme Court has recently announced that from September 11, 1967, hearings on admissibility shall be outside the presence of the jury if the defendant so requests. See *State* v. *Brunson*, — N. J. —, — 230 A. 2d 486, 496, n. 2 (1967).

[2] In *United States* v. *Carignan*, 342 U. S. 36 (1951), relied upon by the trial court, reversal of a conviction was affirmed because the trial judge, after hearing some evidence concerning voluntariness with the jury present, refused to permit the defendant to testify on the subject [illegible]. The other cases cited by the District Court granted writs of habeas corpus in cases in which trial judges had made no independent determination of voluntariness. See, for the citations to these cases, *United States ex rel. Pinto* v. *Pinto*, 260 F. Supp. 782, 781 (D. C. D. N. J. 1966).

Since trial counsel consented to the evidence on voluntariness being taken in the presence of the jury, and the judge found the statement voluntary, respondent was deprived of no constitutional right. The motion of respondent for leave to proceed *in forma pauperis* and the petition for certiorari are granted, the judgment is reversed and the case is remanded to the District Court with instructions to dismiss the writ of habeas corpus.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE FORTAS, concurring.

I concur in the result because of trial counsel's consent to the taking of evidence on voluntariness in the presence of the jury. Otherwise, I disagree. The rule of *Jackson* v. *Denno*, 378 U. S. 368 (1964), should be more than ritual. It was not intended to assure a determination by the judge at the cost of diluting the jury's role in the determination of voluntariness and the weight to be given to admissions. "Just as questions of admissibility of evidence are traditionally for the court, questions of credibility, whether of a witness or a confession, are for the jury." *Id.*, at 386, n. 13. See also *id.*, at 378, n. 8, and cf. *id.*, at 404 (BLACK, J., dissenting).

Jackson v. *Denno* means that the judge and the jury must each make an independent judgment of voluntariness of an admission, the judge for purposes of admissibility and the jury for evidentiary acceptability, credibility, and weight. A telescoped hearing before judge and jury, in which the judge finds voluntariness for purposes of admissibility, in reality reduces the jury function to an echo. Hearing the evidence simultaneously with the judge, the jury is not apt to approach disagreement with him. I believe that the procedure here sanctioned, by reducing the effectiveness of the jury, gravely impairs the constitutional principle of excluding involuntary confessions which *Jackson* v. *Denno* sought to serve.

The jury is the traditional and preferred arbiter of facts. The procedure countenanced here, by dicta, sanctions, in effect, a direction to the jury to accept and give full credence to the admission—because the judge, hearing the same testimony, has ruled that the admission is voluntary.